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In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

GARY MEZZANATTO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. The question in this case is whether a defendant and his attorney may agree to waive the rules that make evidence of plea discussions inadmissible, so as to permit the government to impeach the defendant if his later trial testimony is inconsistent with his statements during the plea discussions. Respondent does not dispute our submission that the Ninth Circuit's decision adopting a per se rule of nonwaivability conflicts with the decisions of other circuits on the same question. See *United States* v. *Dortch*, 5 F.3d 1056 (7th Cir. 1993), petition for cert. pending *sub nom. Suess* v. *United States*, No. 93-7218 (filed Dec. 20, 1993). See also *United States* v. *Perrone*, 936 F.2d 1403, 1412, clarified on other grounds on reh'g, 949 F.2d 36 (2d Cir. 1991); *United States* v. *Stevens*, 935 F.2d 1380, 1396 (3d Cir. 1991). Nor

does respondent dispute our submission that agreements like the proffer agreement invalidated by the Ninth Circuit in this case are widely used by federal prosecutors throughout the country, and that their validity is therefore a question of great importance to the administration of justice in the federal courts. For those reasons, the decision of the Ninth Circuit clearly warrants this Court's attention.

2. Respondent devotes the bulk of his brief to the proposition that the legislative history of the rules shows that Congress intended that evidence of plea discussions be inadmissible even for impeachment, Br. in Opp. 2-8, and that to contravene that congressional policy would violate separation of powers principles. *Id.* at 12-25. Those contentions, however, are irrelevant to our submission. We do not contend that Rule 11(e)(6), Fed. R. Crim. P., and Rule 410, Fed. R. Evid., themselves authorize the use of respondent's statements for purposes of impeachment, apart from his agreement. We contend only that neither those rules, nor any other rule, forbids the application in this context of the same principles of waiver and forfeiture that are routinely applied to other provisions of the rules.

This Court has recognized that "'[n]o procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States* v. *Olano*, 113 S. Ct. 1770, 1776 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). That principle is reflected in the federal rules, which contemplate that a defendant who fails to interpose a contemporaneous and specific objection to a ruling generally forfeits his right

to challenge that ruling on appeal. See Fed. R. Evid. 103(a)(1); Fed. R. Crim. P. 51.

Respondent appears to suggest that the decision of the court of appeals is not inconsistent with that settled principle, because the court recognized that the same right it found nonwaivable could be forfeited if the defendant's attorney failed to object at trial. See Br. in Opp. 2 n.1; Pet. App. 10a n.4. But neither respondent nor the court of appeals has explained why it is sensible to believe that Congress intended to allow forfeiture, but to forbid waiver. Under the Ninth Circuit's analysis, a defendant whose attorney fails to object under Rules 11(e)(6) and 410 to the admission of evidence of plea discussions forfeits any right to claim on appeal that the rules were violated, unless he can shoulder the significant burden of demonstrating a miscarriage of justice amounting to plain error. See *United States* v. *Olano*, 113 S. Ct. at 1779-1781. That is so even though the defendant is not aware of the legal consequences of his counsel's inaction, and even though counsel may not even have realized that there were possible grounds for objection. Yet, under the court of appeals' rule, a defendant is not permitted to agree expressly to the introduction of the same evidence, even when, as here, he has done so knowingly and intelligently after consulting with his counsel. No precedent of this Court supports such an anomalous doctrine.

3. Respondent also contends (Br. in Opp. 21-23) that the nonwaivability rule adopted by the Ninth Circuit is supported by the "mandatory" character of the rules. That contention would have force if the rules were "mandatory" in the sense of expressly providing that their waiver is not permitted. But that is not what Rules 11(e)(6) and 410 say. The rules do not speak to the issue of waiver at all, and thus they are "mandatory"

only in the sense that they preclude certain conduct by the government *in the absence of the defendant's agreement*. As Chief Judge Wallace correctly recognized (Pet. App. 11a-12a), Rules 11(e)(6) and 410 are no more "mandatory" than the rule providing that the right of the people to be secure against unreasonable searches and seizures "shall not be violated," U.S. Const. Amend. IV; or the rule that no person "shall * * * be subject for the same offence to be twice put in jeopardy of life or limb," U.S. Const. Amend. V.*

4. Respondent also claims (Br. in Opp. 8-12) that he should not be held to his agreement, because that agreement violates the public policy in favor of plea bargaining. There is no public policy, however, that mandates whatever might encourage plea bargaining, irrespective of the cost. The cost that respondent's regime would impose on the criminal justice system—enabling a defendant to present tailored, perjurious defenses insulated from effective challenge—outweighs any risk of chilling a defendant's good faith desire to engage in honest bargaining. In addition, respondent's assessment of the relevant public policy considerations overlooks the fact that

* Adopting the reasoning of the court of appeals, respondent also contends (Br. in Opp. 24-25), that the general rule that permits a defendant to waive even the most fundamental rights has no applicability here, because that general rule has been developed by this Court in the course of defining the scope of the underlying rights. That argument confuses the nature of the right at issue with its waivability. A knowing and intelligent guilty plea, for example, is commonly understood to give rise to a lawful conviction. But the Court has never suggested that that is so because the plea may be viewed as the "trial by an impartial jury" that the Sixth Amendment guarantees. Instead, the Court has recognized that a valid plea is a knowing and intentional relinquishment of the defendant's right to have his guilt determined by a jury—*i.e.*, a waiver. See, *e.g.*, *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969).

bargaining is a two-sided process. Because the Ninth Circuit's rule of nonwaivability makes plea discussions significantly less attractive to the prosecution, it is far from clear that that rule will increase the number of dispositions without trial.

5. Finally, respondent contends (Br. in Opp. 25-29) that the Ninth Circuit's per se rule of nonwaivability is justified because the rule prevents the prosecutor from "vouching"—*i.e.*, acting as an unsworn witness and thereby improperly bolstering the credibility of the government's case. As respondent acknowledges, however, "vouching" is a form of prosecutorial misconduct that a defendant can always raise as a ground for relief. Because that conduct is independently redressable when it actually occurs, the mere possibility that it may occur does not justify the broad per se rule adopted by the court of appeals. Here, the court of appeals did not purport to find any improper vouching by the prosecutor, and even if respondent wishes to pursue such a claim on remand, that would not counsel against review of the question actually decided by the Ninth Circuit.

* * * * *

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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